



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 19, 1996

Mr. Richard D. Moore
Deputy General Counsel for Operations
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR96-0587

Dear Mr. Moore:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#s 31835 and 39300.

The Texas Department of Public Transportation ("the department") received two requests for information seeking documents related to the design, maintenance, plan, measurement, survey, and controls of a signaled intersection located at State Highway 121 and Farm to Market Road 544 in Denton County. The requests also sought information regarding any accidents that occurred at the intersection from February 8, 1993 to the present. You assert that the requested documents are excepted by section 552.103(a) of the Government Code. You have submitted a representative sample of the documents that you believe is responsive to the request for information.

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Section 552.103 requires concrete evidence that litigation may ensue. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

In this instance, you explain that the department reasonably anticipates litigation because the attorney for the family of a person killed at the intersection has sent the department a letter promising to file suit against the State. The attorney asks for the information "in lieu of suit and formal discovery." We conclude that litigation is reasonably anticipated here and that the documents in question relate to that litigation.¹ The requested documents, may therefore, be withheld pursuant to section 552.103.²

We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.

In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

¹We note that this office has recently decided the applicability of section 552.103 when a notice of claim is received by a governmental body. Under Open Records Decision No. 638 (1996), a governmental body may establish that litigation is reasonably anticipated by showing that (1) it has received a claim letter from an allegedly injured party or his attorney and (2) the governmental body states that the letter complies with the notice of claim provisions of the Texas Tort Claims Act or applicable municipal statute or ordinance.

In the future, therefore, if you assert that section 552.103(a) is applicable on the basis of a notice of claim letter, you should affirmatively represent to this office that the letter complies with the requirements of the Texas Tort Claims Act or applicable municipal statute or ordinance.

²In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Don Ballard". The signature is written in a cursive, slightly slanted style.

Don Ballard
Assistant Attorney General
Open Records Division

JDB/rho

Ref.: ID#s 31835 and 39300

Enclosures: Submitted documents

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